

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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October 31, 2011

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**RE: Wilmington Trust Company v. Faye Deppe
C.A.No. S11A-01-010-ESB
Letter Opinion**

Date Submitted: July 18, 2011

Dear Counsel:

This is my decision on the Wilmington Trust Company's appeal of the Industrial Accident Board's decision granting Faye Deppe's Petition to Determine Additional Compensation Due for an injury to her left shoulder. Deppe was employed by Wilmington Trust as a customer service representative at one of its branch banks. She injured her left index finger at work on May 18, 2009. Deppe was closing a bank vault door when her left index finger got caught between the vault door and the door jam, resulting in the partial amputation of it. She was taken by ambulance to Beebe Medical Center where Scott M. Schulze, M.D., a general surgeon, unsuccessfully tried to reattach her finger tip. Deppe's finger healed, but she continued to have pain in her left shoulder. She saw her primary care physician and an orthopedic surgeon for her shoulder pain. Deppe's primary care physician concluded that she was suffering from a "frozen shoulder." The orthopedic

surgeon gave Deppe a cortisone shot and sent her to physical therapy. However, the pain in Deppe's shoulder persisted, leading the orthopedic surgeon to conclude that she needed shoulder surgery. In order to get coverage for the surgery she filed a Petition to Determine Additional Compensation Due on July 14, 2010, seeking compensation for a 67 percent permanent impairment to her left index finger and a 10 percent permanent impairment to her left shoulder. The parties had previously reached an agreement covering the initial injury to Deppe's left index finger and they reached an agreement this time regarding Deppe's permanency claim for her left index finger. However, they were unable to reach an agreement regarding Deppe's permanency claim for her left shoulder. Wilmington Trust believes that Deppe's complaints of shoulder pain are not casually related to her accident at work and it also disputes the degree of permanent impairment for her left shoulder.

The Board held a hearing on January 4, 2011. Deppe, Stephen J. Rodgers, M.D., Errol Ger, M.D., and Scott M. Schulze, M.D., testified at the hearing. Deppe told the Board about her accident at work, the medical treatment for her finger, the problems with her left shoulder and the medical treatment she sought for it. Dr. Rodgers testified for Deppe. He is board certified in occupational medicine. Dr. Rodgers told the Board that Deppe suffers from impingement syndrome in her left shoulder and that it was caused by her accident at work. He reasoned that she injured her shoulder when she tried to pull her finger out of the vault door. Drs. Ger and Schulze testified for Wilmington Trust. Dr. Ger is a board certified orthopedic surgeon. Dr. Schulze is a board certified surgeon. Drs. Ger and Schulze told the Board that Deppe's shoulder pain was not related to her accident at work. They believe that her shoulder pain is caused by pain radiating upward from her partially amputated finger. The Board found that Deppe's left shoulder injury was causally related

to her accident at work, reasoning that she hurt her shoulder when she tried to pull her finger out of the vault door. However, the Board rejected Deppe's permanency claim for her left shoulder. Wilmington Trust has now filed an appeal of that portion of the Board's decision in favor of Deppe. I have affirmed the Board's decision because it is in accordance with the applicable law and supported by substantial evidence in the record.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.³ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁴ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁵

¹ *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986)(TABLE).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁴ 29 *Del.C.* § 10142(d).

⁵ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

DISCUSSION

The Board found that Deppe's shoulder injury was casually related to her accident at work on May 18, 2009. This finding has to be supported by substantial evidence in the record. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.⁶ The following is that evidence:

1. Deppe told the Board that she did not have any problems with her left shoulder before her accident on May 18, 2009.⁷
2. Deppe told the Board that she got her finger stuck in the vault door and tried to pull it out, but that it would not come out.⁸
3. Deppe told the Board that she felt pain in her left shoulder soon after the accident.⁹ Deppe also told the Board that she told Dr. Schulze and her physical therapists about this.¹⁰ The physical therapy records confirm that Deppe complained about pain in her left shoulder soon after her accident.¹¹
4. Dr. Rodgers told the Board that when a person gets his or her finger trapped, the person will try to pull his or her finger out.¹² He also told the Board that in such situations it is common to see injuries to the ulnar nerve at the elbow or a brachial plexus injury at the shoulder.¹³ Dr. Rodgers also told the Board that Deppe's complaints of shoulder

⁶ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁷ Transcript at 17 (The Board Hearing transcript will be referenced as "Tr. at ____").

⁸ Tr. at 11.

⁹ Tr. at 15.

¹⁰ Tr. at 15.

¹¹ Rodgers Deposition at 6 (The deposition of Stephen J. Rodgers, M.D. will be referenced as "Rodgers at ____").

¹² Rodgers at 4-5.

¹³ Rodgers at 4-5.

pain were consistent with this happening to her.¹⁴ Dr. Rodgers told the Board that his conclusion that Deppe yanked her hand away was based on her description of the accident to him.¹⁵ Finally, Dr. Rodgers told the Board that this was what caused Deppe's shoulder injury.¹⁶

The evidence in this case is adequate to support the Board's conclusion on causation. Deppe's left shoulder did not hurt before her accident at work. She got her left finger stuck in the vault door and tried to pull it out. Deppe felt pain in her left shoulder soon after her accident. Dr. Rodgers testified that in such situations it is common to see someone injure their shoulder by trying to unstick their finger or hand and that this is what caused Deppe's shoulder injury.

I. Wilmington Trust's Arguments on Substantial Evidence in the Record

Wilmington Trust argues that the Board's decision is not supported by substantial evidence in the record. This argument is broken down into two separate and distinct arguments. One, Wilmington Trust argues that Dr. Rodgers' opinion is based on nothing more than speculation and conjecture. Two, Wilmington Trust argues that the Board's finding that Deppe's shoulder pain was not caused by pain radiating from her partially amputated finger is not supported by substantial evidence in the record.

A. The Evidentiary Basis for Dr. Rodgers' Opinion.

Wilmington Trust states the following in support of its argument that Dr. Rodgers' opinion is based on nothing more than speculation and conjecture.

¹⁴ Rodgers at 6.

¹⁵ Rodgers at 5, 43.

¹⁶ Rodgers at 5 - 6, 9.

“Dr. Rodgers’ entire causation opinion hinges on claimant forcefully withdrawing her trapped finger from the vault door, yet there is not a single shred of evidence to support such a conclusion.”

I have concluded that Wilmington Trust’s argument ignores the evidence in the record. The testimony of Deppe and Dr. Rodgers and the Board’s own statements make it clear that Deppe got her finger stuck in the vault door and tried to pull it out. Deppe told the Board, when describing what she did when her finger got stuck in the vault door, the following:

“And by the time I turned around, it was - - there’s a little ledge and apparently I guess when I turned my hand like this the ledge caught - - it’s like a little lip edge there and it caught it. And when I turned around and started to pull my hand, I was like in shock. I didn’t feel anything. It was numb but I could feel. I was trying to pull my hand out and it wouldn’t come. It’s like - - it was like nudging. And so I pulled it and I looked at my finger and saw it was like the inside of my finger and it just scared me and I screamed.”¹⁷

Deppe later told the Board, when discussing what she told Dr. Rodgers, the following:

Question: And so you gave him the information about having your hand stuck and pulling it back and then the fingertip coming off after you shook your hand?

Answer: I want to say I did. I’m not sure.

Question: But you do specifically recall that at this time that’s what happened?

Answer: Yes. I told - - I mean the same my story that’s how it happened.

Question: But the fingertip was not actually in the door. It was on the floor when you flicked your hand, is that right? The piece that fell off your hand?

¹⁷ Tr. at 11.

Answer: All I know is my hand I snatched it, pulled it. I was like - - it was almost like I was dreaming. And I just felt a little nudging like something pulling my finger. And I snatched it, looked at it, and went like - - screamed and went like this.¹⁸

Dr. Rodgers told the Board, when discussing what Deppe told him about how her accident occurred, the following:

Question: When she described the incident to you, it was the vault door closing on her hand that you conclude, she yanked her hand away from.

Answer: Yes.¹⁹

The Board, when discussing the evidence in this case, stated the following:

Claimant testified that she was injured while at work for Employer when her left index finger was caught in a bank vault door. Claimant explained that she had been struggling to get the large, heavy door locked properly and while calling for assistance inadvertently had her hand trapped in between the door and its locking mechanism. Claimant testified that she tried to pull her hand out but realized as she shook the hand free of the door that part of her left index finger had become detached and was lying on the floor in front of her. Claimant was taken by ambulance to Beebe Hospital's Emergency Department.²⁰

It is clearly set forth in the record, and understood by both Dr. Rodgers and the Board, that Deppe got her finger caught in the vault door and tried to pull it out. However, her finger did not come out until the vault door released her finger by amputating her finger tip. Moreover, it is clear that Dr. Rodgers' opinion about the cause of Deppe's shoulder injury is based on and supported by her testimony. It is not, as Wilmington Trust argues,

¹⁸ Tr. at 26.

¹⁹ Rodgers at 5.

²⁰ Board Decision at 3 (Jan. 7, 2011) (The Board Decision will be referenced as "Board at ____").

based on nothing more than speculation and conjecture.

B. The Board's Rationale for Rejecting the Opinions of Drs. Ger and Schulze.

Wilmington Trust argues that the Board's finding that Deppe's shoulder pain was not caused by pain radiating from her partially amputated finger is not supported by substantial evidence in the record. The Board was presented with two different opinions about the cause of Deppe's shoulder injury. Dr. Rodgers testified that Deppe hurt her shoulder when she tried to pull her finger out of the vault door. Drs. Schulze and Ger testified that Deppe's shoulder pain was caused by pain radiating upward from her partially amputated finger. The Board accepted Dr. Rodgers' opinion and largely rejected the testimony and opinions offered by Drs. Schulze and Ger. As I have already decided, the Board's finding on causation is supported by substantial evidence in the record.

The Board's decision to accept Dr. Rodger's opinion instead and to largely reject the testimony and opinions offered by Drs. Ger and Schulze is appropriate under the applicable law and supported by substantial evidence in the record. When the parties provide expert testimony, the Board is free to choose between conflicting medical opinions, and either opinion will constitute substantial evidence for purposes of an appeal.²¹ In that same light, it is within the Board's discretion to accept the testimony of one expert over another when their opinions are conflicting and supported by substantial evidence.²² Moreover, the Delaware Supreme Court has consistently held that it is the Board's function

²¹ *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

²² *Romine v. Conectiv Communications, Inc.*, 2003 WL 21001030, at *5 (Del. Super. April 22, 2003).

to resolve conflicts in medical testimony.²³

The Board rejected the opinions offered by Drs. Ger and Schulze for a number of reasons. One, the opinions offered by Drs. Ger and Schulze were based on a factual assumption that turned out to be incorrect. Drs. Ger and Schulze based their opinions, at least in part, on their belief that Deppe did not complain of pain in her left shoulder soon after her accident at work. Dr. Schulze told the Board that Deppe never complained to him at all about pain in her left shoulder. Both doctors told the Board that if Deppe had injured her left shoulder at work, then they would have expected her to complain about it soon after the accident. They both also conceded that if Deppe had complained of pain in her left shoulder earlier in her treatment for her finger injury, then they would have been more inclined to believe that her shoulder pain was caused by her accident at work. Deppe told the Board that she complained to both Dr. Schulze and her physical therapists about her shoulder pain. As it turns out, her physical therapy records support her testimony. They do show that Deppe complained of shoulder pain soon after her accident at work. This negatively affects the credibility of Drs. Ger and Schulze in a couple of ways. It shows that they did not thoroughly review Deppe's physical therapy records before reaching their opinions. It also undermines their own stated rationale for their opinions.

Two, Dr. Ger repeatedly changed his opinions. Dr. Ger initially told the Board that Deppe's shoulder pain was caused by pain radiating upward from her partially amputated finger. When Dr. Ger was confronted with the fact that Deppe's physical therapy records showed that she complained of pain in her left shoulder on several occasions, he changed

²³ *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

his opinion and stated that it would be reasonable to conclude that her shoulder pain was related to her accident at work. Dr. Ger then changed his opinion again and testified on re-direct that Deppe's complaints of shoulder pain were not indicative of a shoulder injury because she did not complain about it often enough. Clearly, as the Board noted, Dr. Ger's credibility was not enhanced by the frequency and ease with which he changed his opinions.

Three, the Board found Dr. Schulze less credible because he seemed pre-disposed to relate Deppe's complaints of shoulder pain to her injured finger. Dr. Schulze was forced to acknowledge that Deppe had complained of shoulder pain during her physical therapy sessions. He also had to admit that he signed the physical therapy notes that mentioned her complaints of shoulder pain. However, he refused to change his opinion because he felt that her complaints of shoulder pain were insufficient to support a conclusion that her shoulder was injured during her accident at work. The Board noted that this was consistent with Deppe's testimony that she got the impression that Dr. Schulze and her physical therapists paid little attention to her shoulder pain because they believed it was caused by the pain coming from her partially amputated finger. The fact that Dr. Schulze seemed to have made up his mind early on about the cause of Deppe's shoulder pain and would not change or moderate his opinion when confronted with facts that were inconsistent with his assumptions tended to make Dr. Schulze less credible to the Board.

The Court does not make its own decisions regarding the credibility of the medical experts. That is properly the role of the Board. The Board's reasons for finding Drs. Ger and Schulze less credible than Dr. Rodgers are supported by the substantial evidence in the record.

II. The Analytical Framework of the Board's Decision.

Wilmington Trust argues that the Board committed an error of law by placing the burden of proof on it to prove that Deppe's shoulder pain was not related to her accident at work. In support of this, Wilmington Trust states:

"In the Board's decision, the Board cites the appropriate standard of law, which is the Claimant bears the burden of proving the causal relationship of the injury and the work accident, but does not cite any testimony offered by the Claimant or her expert medical witness, Dr. Rodgers, to support its decision that Claimant's shoulder injury is casually related to the work accident. Rather, the Board only points out parts of the testimony by Employer's medical experts that it believes fail to prove that Claimant's shoulder injury was not casually related to the work accident."²⁴

Wilmington Trust's argument ignores the entirety of the Board's decision. The Board clearly discussed the testimony of Deppe and Rodgers at length in its 28 page decision. The Board, in its Summary of the Evidence section, noted the following testimony regarding the cause of Deppe's shoulder injury:

1. Deppe said that she got her finger stuck in the vault door and tried to pull it out.²⁵
2. Deppe said she had no pain in her left shoulder before her accident at work.²⁶
3. Deppe said that she complained of pain in her left shoulder to her physical therapists and Dr. Schulze.²⁷
4. Dr. Rodgers said that Deppe hurt her left shoulder when she tried to

²⁴ Appellant's Opening Brief at 30.

²⁵ Board at 3.

²⁶ Board at 4.

²⁷ Board at 4.

pull her finger out of the vault.²⁸

5. Dr. Ger said that Deppe's shoulder injury was related to her accident at work after being forced to admit that she had complained of shoulder pain to her physical therapists.²⁹
6. Dr. Schulze said that if Deppe had really hurt her shoulder at work, then she would have complained of it sooner. He was later forced to admit that she did make such complaints, but he would not change his opinion about the cause of her shoulder pain.³⁰

The Board, in its Findings of Fact and Conclusions of Law section, noted the following:

1. Deppe had no pain in her left shoulder before her accident at work.³¹
2. Drs. Ger and Schulze conceded that if Deppe had complained of pain in her left shoulder soon after the accident, then it would be far more likely that the pain in her shoulder would be related to her accident at work.³²
3. Deppe did make complaints of shoulder pain to her physical therapists.³³
4. Dr. Ger changed his opinion to agree with Dr. Rodgers and then disagreed with him when questioned again by Wilmington Trust's attorney.³⁴
5. Dr. Schulze's insisted on sticking to his own opinion despite being confronted with evidence that Deppe had complained of pain in her

²⁸ Board at 7-8.

²⁹ Board at 15.

³⁰ Board at 16-19.

³¹ Board at 22.

³² Board at 23.

³³ Board at 23.

³⁴ Board at 23.

shoulder. This was consistent with Deppe's testimony that he and the physical therapists believed that her shoulder pain was related to pain from her finger and not a separate injury.³⁵

In finding in favor of Deppe, the Board stated:

As such, based upon the testimony of all three physicians in this case, the Board is satisfied that the symptoms associated with Claimant's left shoulder constitutes compensable injury casually related to Claimant's May 18, 2009 industrial accident.³⁶

It is Wilmington Trust that has misinterpreted the Board's decision and its rationale for it. The Board did cite and rely on the testimony of Deppe and Dr. Rodgers in reaching its findings. Indeed, as the Board itself stated, it relied on the testimony of all three doctors in this case. That has to include Dr. Rodgers' testimony. Deppe testified about getting her finger stuck in the vault door and trying to pull it out. She also testified about having no pain in her shoulder before the accident and then having pain in her shoulder after the accident. Dr. Rodgers testified that Deppe hurt her shoulder by trying to pull her finger out of the vault door. The Board discussed all of this in its Summary of the Evidence section. Drs. Ger and Schulze both offered testimony that was helpful to Deppe. They both testified that if Deppe had complained of pain in her shoulder earlier, then they would have been more inclined to relate it to her accident at work. The Board discussed this both in its Summary of Evidence and in its Findings of Fact and Conclusions of Law sections. The Board went on in this last section to explain why it rejected the other opinions of Drs. Ger and Schulze. Quite simply, the Board relied on the parts of their testimony that it found

³⁵ Board at 24.

³⁶ Board at 24.

credible and rejected the parts of their testimony which it found not to be credible. It is well within the Board's discretion to do this. This also explains the Board's statement that it was relying on the testimony of all three doctors in reaching its decision. The Board, in reaching its decision, clearly relied on the testimony of Deppe and Dr. Rodgers and those portions of the testimony of Drs. Ger and Schulze that were helpful to Deppe when it concluded that she injured her shoulder when she tried to pull her finger out of the vault door. The Board did not, as Wilmington Trust argues, reject the opinions of Drs. Ger and Schulze and then conclude that by default that Deppe's shoulder pain was caused by her accident at work. That argument simply ignores the testimony of Deppe and Dr. Rodgers, as well as the testimony of Drs. Ger and Schulze that the Board found to be consistent with Dr. Rodgers' opinion and upon which the Board clearly relied, as evidenced by its statement that it was relying upon the "testimony of all three physicians in this case."

CONCLUSION

This case is like many cases that come before the Board. Each side has a theory on the cause of the employee's injury that is supported by expert medical testimony. Faced with such a conflict in the testimony, the Board accepts the testimony of one expert and rejects the testimony of the other expert. That is what happened in this case. The Board accepted Dr. Rodgers' opinion and the testimony of Drs. Ger and Schulze that it found to be credible and rejected the testimony of Drs. Ger and Schulze that it did not find to be credible. The Board had good reasons for doing so. Absent an error of law, the role of this Court is limited to determining if the Board's decision is supported by substantial evidence in the record. I have concluded that it is in this case. Deppe told the Board she got her finger stuck in the vault door and tried to pull it out. Dr. Rodgers testified that such

an effort commonly produces a shoulder injury and that this is how Deppe injured her shoulder. The Board found this testimony to be credible and concluded that Deppe's shoulder injury was causally related to her accident at work on May 18, 2009. Therefore, I have concluded that the Industrial Accident Board's decision granting Faye Deppe's Petition to Determine Additional Compensation Due must be **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office
cc: Industrial Accident Board